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IN THE

Supreme Court of the United States

October Term, 1927. No. 673

LOUIS K. LIGGETT COMPANY,

Appellant,

vs.

THE HONORABLE THOMAS J. BALDRIGE, Attorney General of the Commonwealth of Pennsylvania; CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,

Appellees.

Brief for Appellees

A. COUNTER STATEMENT OF THE CASE

In view of the statement of the case contained in the brief of the appellant, it is unnecessary for the appellees to present any further discussion of the facts, other than to comment upon two features of the case which the appellees consider to be of primary importance.

(a) The brief for the appellant states that the Act of May 13, 1927 (Pa. Pamph. Laws, p. 1009; West Pa. Stat. (1928) Sections 9377 a-1, 2), the constitutionality of which is the subject of controversy in this case, deals solely with the ownership of drug stores, and contains no provision respecting the compounding of drugs,

chemicals or poisons, or other regulation relative to the practice of pharmacy. The Act, it must always be remembered, is a supplement to the Act of May 17, 1917 (Pa. Pamph. Laws, p. 208; West Pa. Stat. (1920) Sections 9301 et seq.), which latter act is the principal statute now in force in Pennsylvania regulating the practice of pharmacy. The Act of 1927 must always be considered as one part only of a series of enactments regulating such practice.

(b) The record clearly shows (R. 75-77) that subsequent to May 13, 1927, the effective date of the Act of 1927, the appellant acquired a retail drug business or pharmacy in Hanover, Pennsylvania, and owned and conducted a pharmacy there; that the appellant applied for a permit to conduct said pharmacy, which permit was refused by the Pennsylvania State Board of Pharmacy; and that the appellees intend to and will proceed against the appellant for its violation of the provisions of the Act of 1927 in owning and conducting said pharmacy.

With respect, however, to the two pharmacies owned and conducted by the appellant in Philadelphia and Pottsville, Pennsylvania (Bill of Complaint, Paragraph 10 and 12, R. 4; Supplemental Bill of Complaint, Paragraph 3, R. 65), the Pennsylvania State Board of Pharmacy has at no time refused to grant permits to the appellant for the conduct of said pharmacies, nor have the appellees or any of them threatened to revoke any licenses of the appellant or to institute any proceedings, civil or criminal, against it. (Reply Affidavits re Preliminary Injunction, R. 53-59; Answer to Bill of Complaint, Paragraphs 11, 12, 19 and 20, R. 68-70; Answer to Supplemental Bill, Paragraph 4, R. 73.)

B. ARGUMENT

I. Preliminary Statement

The contention of the appellees that the Act of May 13, 1927, is constitutional is based upon the proposition that the statute was enacted by the Legislature of the Commonwealth of Pennsylvania by virtue of the police power inherent in it to legislate for the public good, health and welfare, and upon that proposition alone. The Legislature has seen fit to provide that the proper regulation of the practice of pharmacy requires that pharmacies shall be owned and conducted by duly licensed and registered pharmacists.

Such legislation represents the reasoned judgment of the State, through its legislative body, as to the necessity for such regulation, and every presumption should be indulged to sustain the validity of the statute.

II. Principles Governing Judicial Determination of Constitutionality of Statutes Enacted Under the Police Power.

It would be impertinent to argue at any length concerning the principles upon which a statute enacted in pursuance of the police power is determined to be constitutional or unconstitutional. A reference to the rule is sufficient, and no shorter or more complete statement of it can be found than that of this Court in Graves vs. Minnesota, 272 U. S. 425; 71 L. Ed. 331; 47 Sup. Ct. Rep. 122 (p. 428):

> "And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest. Great Northern R. Co. v. Minnesota, 246 U. S. 434,

439, 62 L. Ed. 817, 819, 38 Sup. Ct. Rep. 346; Gitlow v. New York, 268 U. S. 652, 668, 69 L. Ed. 1138, 1146, 45 Sup. Ct. Rep. 625."

III. Analysis of Existing Legislation Regulating the Practice of Pharmacy in Pennsylvania

The statutes now in force in Pennsylvania regulating the practice of pharmacy are the Act of May 17, 1917, referred to before, and the supplements thereto, the Act of May 26, 1921 (Pa. Pamph. Laws, p. 1172; West Pa. Stat. (1928) Sections 9329 a-1, et seq.), the Act of April 27, 1925 (Pa. Pamph. Laws, p. 299; West Pa. Stat. (1928) Sections 9329 b-1, et seq.) and the Act of May 13, 1927. There have been minor amendments of the Act of May 17, 1917, and there are other statutes regulating the quality and disposal of drugs and medicines, but they are not important here.

The Act of May 17, 1917, which was practically a codification of the then existing laws regulating pharmacy, with the addition of more stringent requirements, provided for the establishment of the Pennsylvania State Board of Pharmacy and the licensing of pharmacists and assistant pharmacists, and prescribed certain regulations for, in the words of its title, "the practice of pharmacy and the sale of poisons and drugs." Although no specific definition of "the practice of pharmacy" is made by the Act, a reading of its various sections, particularly Sections 13, 14 and 15 (West Pa. Stat. (1920) Sections 9323-25) will provide a definition somewhat as follows:

> *The preparing, compounding, dispensing and selling at retail of drugs, medicines, poisons or physicians' prescriptions.*

The terms "drug" and "poison" are defined in the Act and a "pharmacy" is defined as a "place where drugs, medicine, or poisons are compounded, dispensed, prepared or sold at retail."

The Act specifically recognized the right of one not a registered pharmacist to own a pharmacy if he employed a registered pharmacist to conduct it. (See particularly Section 15, West Pa. Stat. (1920) Section 9325.) A proviso to Section 13 (West Pa. Stat. (1920) Section 9323) declared that nothing in the Act should be construed to "prevent the sale or manufacture of proprietary medicines, nor prevent storekeepers from dealing in and selling commonly used household drugs when the same are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers, or wholesale druggists."

The Act of 1917 contained no provision for the licensing of pharmacies. The Act of May 26, 1921, a supplement to the Act of 1917, required the licensing of pharmacies under the supervision of the State Board of Pharmacy. This Act likewise recognized the right of one not a registered pharmacist to own a pharmacy if a registered pharmacist were employed. It was further provided that the Act should "not be construed to apply to any store or stores opened for the sale of proprietary or so-called patent medicines." (Section 1, West Pa. Stat. (1928) Section 9329 a-1).

The Act of April 27, 1925, required and regulated the registration of apprentices.

It is clear that the above Acts were not intended to and do not regulate or refer to anything but the practice of pharmacy and the operation of pharmacies, as that term is used in the Acts with a restricted meaning, that is, the compounding, preparing, dispensing and selling at retail of drugs, medicines, poisons and prescriptions. The Acts have been so applied and enforced; there is no regulation or interference with the other classes of business transacted by the store commonly known as a "drug store."

The Act of May 13, 1927 is another supplement to the Act of 1917. It is this act which is now before this

Court. Its provisions have been set forth verbatim in the brief for the appellant (p. 11) and it is not necessary to repeat them here. The purpose of the Act was to prohibit the ownership and conduct of a pharmacy, as defined in the Act of 1917, by others than licensed pharmacists. The limited meaning of the term "pharmacy" is carried over into the Act of 1927. Section 1 specifically provides that nothing therein shall be construed to prevent or affect the ownership by other than a licensed pharmacist of a store or stores wherein the sale or manufacture of drugs or medicines is limited to proprietary medicines and commonly used household drugs provided such commonly used household drugs are offered for sale or sold in packages which have been put up ready for sale to consumers by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists.

It is true that it is provided that, after the passage of the Act, no corporation, association or partnership shall own and conduct a pharmacy unless all the partners or members thereof are licensed pharmacists, but this is only another way of saying that pharmacies shall be owned and conducted by registered pharmacists with permission to such registered pharmacists to carry on and conduct the business of the pharmacy, in case there are more than one, either as a partnership, an association or a corporation. The Commonwealth is not interested in the form of organization under which the pharmacy is owned and conducted. It is interested in the qualifications of the persons who shall own and conduct the pharmacy under any one of the designated forms. All persons, partnerships, associations and corporations owning and conducting pharmacies at the time of the passage of the Act are permitted to continue existing pharmacies, but not to establish new ones.

Stated as briefly as possible, the purpose of the Act of 1927, when read in connection with the Acts of 1917

and 1921, was to restrict the ownership and conduct of pharmacies by which is meant the business of compounding, preparing, dispensing and selling at retail, drugs, medicines, poisons and physicians' prescriptions, as to pharmacies established after the passage of the Act, to licensed pharmacists, and at the same time permit such licensed pharmacists to own and conduct their pharmacies either individually or as partnerships, associations or corporations.

IV. The Provisions of the Act of May 13, 1927 are Reasonable and Have a Substantial Relation to the Health and Welfare of the Public.

A statute passed by a State Legislature in pursuance of the police power will not be declared unconstitutional by the courts, unless it is clearly unreasonable and arbitrary and has no substantial relation to the general well-being and welfare of the community. The action of the Legislature in passing the particular statute under attack is in itself entitled to be given great weight by the courts as indicating the necessity for the enactment.

In Graves vs. Minnesota, *supra*, in which was involved the constitutionality of a statute of Minnesota regulating the practice of dentistry, Mr. Justice Sanford, in delivering the opinion of this Court, said (p. 429):

> "By enacting the present statute the state has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler vs. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273."

In delivering the opinion of the special Court sitting upon the application for the preliminary injunction, Judge Dickinson, in discussing the relation of the Act of 1927, to the public health and welfare, said (R. 82, 83):

> "We, of course, recognize the force of the argument addressed to us based upon the distinction between a law which forbade any one other than a skilled pharmacist to compound medicines and another law which forbade any one other than pharmacists to have a share in the ownership in the business of a drug store. Even here, however, we are unable to say that there is not a substantial relation of ownership to the public interest. The medicines must be in the store before they can be dispensed to those who come to the store for the help which medicines can afford them. What is there is dictated not by the judgment of the pharmacist who hands it out to customers but by those who have the financial control of the business. It may be the legislature thought that a corporate owner, in purchasing drugs, might give a greater regard to the price than to the quality; and if such was the thought of the legislature can this Court say it was without a valid connection with the public interests and so unreasonable as to be unlawful? How that matter affects the public interest is illustrated by another kind of business.
>
> "A number of years ago the business of selling liquor was wholly in the hands of those who sold it. Inn-keepers and Tavern-keepers stood high in the respect of their neighbors. The practice grew up of Brewers and Distillers taking over the ownership of places where intoxicating liquors were sold. The saloon when ownership and management became separated soon became a nuisance and a menace so that its abolishment was demanded, and no one at any time would wish to witness its return.
>
> "A saloon is of course not a drug store but the point is that the provisions of this Act can no more

be said to have no substantial relation to the public interests than a law would have been which, with the object of preventing nuisances, forbade any one but tavern-keepers themselves from having a financial interest in the tavern-keeping business. That financial ownership interest and managerial sense of responsibility each have a relation to a wise public policy and hence to the public interest is evidenced by the experience of the Courts in Pennsylvania upon whom was thrust the responsibility of granting liquor licenses. Every Judge who had to do with this duty was soon brought to realize the element of danger to the public conduct of taverns and saloons the moment the profits from the sales of liquor went to owners who were removed from and had no sense of the responsiblity of management. There enters into every business the two motives of a wish for profit and a sense of duty obligation towards those with whom the management deals. When these are joined the latter operates to some extent; the moment they are separated the former is in sole control. This thought deals with the relation between things which should be joined and the public policy of not permitting them to be separated. There is likewise the thought of things which should not be joined. The Act of Assembly of June 9, 1881, providing that no license to sell intoxicating liquor be granted to the owner of a place of amusement is an illustration. The relation to the public interests is of course here more direct and the recognition of it in legislation more common but in principle the two legislative acts are alike.

"Because of our inability to make the finding that the instant Act of Assembly has no substantial relation to the public interest, we cannot hold it to be unconstitutional. What opinion may be entertained of the wisdom of much of the legislation of this general character and of the motives of those who have prompted it, the Courts are not called upon to express."

Almost simultaneously with the filing of the bill in this case, George B. Evans, a Pennsylvania corporation, filed a petition under the declaratory judgment statute in Pennsylvania, making the appellees in the present case the defendants, to secure a decree as to the constitutionality of the Act of May 13, 1927. The Court of Common Pleas, No. 4, of Philadelphia County, held the act constitutional, and the case was appealed to the Supreme Court of Pennsylvania. The case has been argued in that court, but no decision has been handed down to date.

In discussing the statute as a valid exercise of the police power, the Court said, in its opinion, which is printed as Appendix A to this brief:

> "The only practical effect of the Statute upon the petitioner is to preclude it from extending its business activities by setting up additional pharmacies, unless its present stockholders dispose of their shares of stock to licensed pharmacists, or themselves procure licenses to practice pharmacy. This, however, is undoubtedly a restriction upon its business, and for that interference with its rights no compensation is provided.
>
> "The fact just pointed out, however, does not establish the invalidity of the Act of May 13, 1927.
>
> "The Commonwealth, as sovereign, may, within limits, cause, without making compensation therefor, discomfort, injury, loss or even ruin to a part of the community in the interest of the greater part. This right exists by virtue of its duty to provide for the health, the safety and the morale of its people. To enable it to perform that duty government is vested with what is known as the police power. That term, necessarily perhaps, is without an exactly formulated meaning. It was said by Mr. Justice Holmes to be an expression 'convenient to conciliate the mind to something that needs explanation.' By the exercise of this power, private property may be so regulated and

controlled by the appointed agencies of the State that its use shall not be harmful to the members of the community at large. Regulation under a proper exercise of the police power is due process of law, not confiscation, even though property is thereby taken, injured or destroyed. Under what circumstances and to what extent this power is to be exercised is, in the first instance, to be determined by the Legislature. Whether the subject which the Legislature purposes to regulate is a proper subject for regulation and, if so, whether the regulation attempted has exceeded the proper limit are questions for the courts. The latter, however, are 'concerned only with the questions whether the Statute has a recognized police purpose and whether it has a reasonable relation to the object to be attained': WHITE'S APPEAL, 287 Pa. 259; HARRIS VS. STATE BOARD OF OPTOMETRICAL EXAMINERS, 287 Pa. 531.

"The question whether the regulation of pharmacies (the word pharmacy is defined by the Act of May 17, 1917, P. L. 208, as 'a retail drug store, or any place where drugs, medicine or poisons are compounded, dispensed, prepared or sold at retail,' and is used in that sense in the Act under consideration), is within the police power of the Commonwealth is a simple one. The protection of the public health is today one of the great purposes of all civilized governments. The term 'drug' as used in the Acts just referred to 'includes all medicine and preparations recognized by the United States Pharmacopœia, the National Formulary, or the American Homeopathic Pharmacopœia, for internal or external use, and any other substance or mixture of substances, intended to be used for the cure, mitigation or prevention of disease of either man, or other animals.' Obviously, nothing touches the health of the people more closely than the conduct of drug stores or pharmacies, and control over them has long been exercised by our State authorities.

"The great question in the case is whether the effort of the Legislature to bring all retail drug stores into the ownership of licensed pharmacists has a reasonable and substantial relation to the purpose of preserving and improving the health of the people of Pennsylvania. Without such relation, interference with the rights of the petitioner and others similarly situated is not to be tolerated. It was said by our Supreme Court, in WHITE'S APPEAL, *supra*, per Kephart, J.: 'There is one matter that is quite certain—the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety and general welfare. The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws, or for purely æsthetic considerations.'

"After much deliberation, the Court has reached the conclusion that the question last stated must be answered in the affirmative. It is true that the advantage to the public health of bringing the ownership of retail drug stores into the hands of licensed pharmacists is not at first sight as apparent as is that of requiring the compounding of medicines and the sale of drugs to be in the actual charge of those whose qualifications as pharmacists are vouched for by the license of the Pennsylvania Board of Pharmacists; but it, nevertheless, exists.

"The pharmacist in charge of a retail drug store, if its proprietor does not conduct the business himself, must always be selected by the latter. Necessarily, all pharmacists are not of the same professional skill; all are not characterized by the same fidelity to duty; all are not entitled to the same trust and confidence. The proprietor who is a licensed pharmacist, or a group of such persons,

is in a far better position to select a reliable man to attend to the practical work of the pharmacy than is the ordinary layman, or an association of men unacquainted with drugs. Also, the proprietor qualified as required by the Act can supervise more intelligently and effectively the conduct of those employed in the drug store. The purchase of supplies in the shape of drugs for sale and retail can be made by the proprietor licensed as a pharmacist with better judgment and with less danger of deception than in the case of a proprietor not so qualified. There can be little doubt that to bring the proprietor of a drug store into direct relation with the Pharmacy Board will facilitate the efforts of that body to enforce the laws governing the operation of retail drug stores. All these facts cannot but result in an improved service to the public, and thereby tend very materially to promote the health of the people. We are of the opinion that the relation between the measure proposed and the welfare of the community as a whole is reasonable and substantial. The fact that the Legislature has made an exception in favor of the present owners of drug stores who are not licensed pharmacists is not evidence against this view.

"In our opinion the Act of May 13, 1927, presents a case of the proper exercise of the police power of the Commonwealth. Its application to the petitioner and others similarly situated is not confiscatory. They are not thereby deprived of due process of law. They are not denied equal protection of the law, since all in the same class are placed upon the same footing. The statute in question does not offend against the organic law of the land, and is, therefore, valid and operative. A declaratory judgment has accordingly been entered to that effect."

An Act similar to the Act of May 13, 1927, has been in force in New York since 1923, being Section 234 of the Public Health Law, as amended by Chapter 269 of

the Laws of 1923, effective April 24, 1923. This section is as follows:

> "Every pharmacy shall be owned by a licensed pharmacist and every drug store shall be owned by a licensed druggist and no co-partnership shall own a pharmacy unless all the partners are licensed pharmacists and no co-partnerships shall own a drug store unless all the partners are licensed druggists; except that any corporation, organized and existing under the laws of the State of New York or of any other State of the United States and authorized to do business in the State of New York and empowered by its charter to own and conduct pharmacies or drug stores, and, at the time of the passage of this act, still owns and conducts a registered pharmacy or pharmacies or a registered drug store or drug stores in the State of New York, may continue to own and conduct the same and may establish and own additional pharmacies or drug stores in accordance with the provisions of this article, but any such corporation which shall not continue to own at least one of the pharmacies or drug stores theretofore owned by it or ceases to be actively engaged in the practice of pharmacy, shall not be permitted thereafter to own a pharmacy or a drug store; and except that any person not a licensed pharmacist or a licensed druggist, who at the time of passage of this act owns a registered pharmacy or a registered drug store in the State of New York, may continue to own and conduct the same in accordance with the provisions of this article."

The New York Act was before the Supreme Court of Albany County in Tucker vs. New York State Board of Pharmacy, 217 N. Y. S. 217. This case was an application for an order of mandamus against the New York State Board of Pharmacy to direct that Board to transfer the petitioner's certificate to conduct a pharmacy, which was in existence at the time of

the passage of the Act, from one location in New York to another. The Court held that the Act did not prohibit the removal of a pharmacy from one location to another and entered an order of mandamus. The constitutionality of the Act was questioned by the petitioner and the Court held with reference thereto (page 220):

> "The petitioner questions the constitutionality of the act in question. The practice of pharmacy is of such a nature as to permit its regulation by the legislature. In enacting Section 234 of the Public Health Law, I think the legislature has adopted a reasonable regulation well within its authority under the constitution."

Narcotics and liquors are part of the drugs and medicines dispensed by a pharmacy. The importance of assuring the proper enforcement of the laws governing the distribution of these articles is evident. Compliance therewith can be enforced only through the criminal statutes or through the suspension or revocation of licenses. The statutory regulations in Pennsylvania, prior to the Act of May 13, 1927, were inadequate.

The Act of May 26, 1921, provides that a license to conduct a pharmacy may be suspended or revoked upon a second or any subsequent conviction, of the owner thereof, under the laws of Pennsylvania or the United States, relative to the sale of drugs or the sale of intoxicating liquors. In many cases first convictions were secured. By the time, however, that a second conviction could be secured with reference to any particular pharmacy owner, the pharmacy had been sold and the State Board of Pharmacy was without authority to prevent the issuance of a new license to the new owner, who invariably disclaimed all knowledge of the former violation. When the owner of the pharmacy is a registered pharmacist, such an evasion is impossible.

Similarly, when a violation of a certain provision of the statutes regulating pharmacies, on the part of a particular registered pharmacist, was reported, it was discovered that the owner of the pharmacy was not a registered pharmacist, and upon complaint being made to him, the answer was that he was not a pharmacist and was not acquainted with the laws and that they had not been violated wilfully. Upon questioning the registered pharmacist in charge of the pharmacy, his answer was that he had been ordered to keep certain customs and practices and it was necessary for him to do so in order to retain his position. The difficulty of securing compliance with the statutes under these circumstances is evident.

The connection between the regulation of a profession and the ownership of the business conducted in the practice of the profession has been recognized in the practice of both law and medicine. The legislatures and courts have realized that ownership carries with it a responsibility which does much to insure the proper practice of a profession when ownership is restricted to those qualified to practice. This fact has been emphasized both by Judge Dickinson, in his opinion in the District Court, and in the opinion of the Court of Common Pleas of Philadelphia County. The legislatures in practically all states have found it necessary to prohibit, by direct or indirect legislation, corporations from entering the professions by employing lawyers or doctors to act for them.

In People vs. Title Guaranty and Trust Company, 227 N. Y. 366, 125 N. E. 666, which involved the consideration of a statute prohibiting the practice of law by a corporation, the Court said (p. 668):

> "In approaching the decision of the question, and at the outset we ought to consider what must have been the purpose of the Legislature in enacting the statute. That purpose seems obvious. There are certain fundamental requirements and

features which, according to our conception, in this state attend and surround the practice of law and rendition of truly legal services. These are the possession of sufficient knowledge and skill, the existence of a relationship of trust and confidence upon which the client may securely rely, and the power of courts to use summary proceeding, if necessary, to enforce on the part of the attorney observance of the obligations and duties growing out of this relationship. A corporation could not adequately comply with and subject itself to these requirements, if there were no penal statute. Through the employment of attorneys as its agents it might fairly meet the requirements of knowledge, skill, and ordinary legal responsibility; but it could not establish a relationship of confidence, and be subject to summary control, as an individual attorney can. MATTER OF COOPERATIVE LAW CO., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879."

There are numerous cases in which similar expressions have been made by the courts of the various states. Some of them are: Re COOPERATIVE LAW COMPANY, 198 N. Y. 479, 92 N. E. 15; HARMON VS. SIEGEL-COOPER COMPANY, 167 N. Y. 244, 60 N. E. 517; PEOPLE VS. DERMATOLOGICAL INSTITUTE, 192 N. Y. 454, 85 N. E. 697; WORLD'S DISPENSARY MEDICAL ASSOCIATION VS. PRINCE, 203 N. Y. 419, 96 N. E. 738; PEOPLE VS. MERCHANTS' PROTECTIVE CORPORATION, 209 Pac. 363 (Cal.); PEOPLE VS. CALIFORNIA PROTECTIVE ASSOCIATION, 244 Pac. 1089 (Cal.); NEW JERSEY COMPANY VS. SCHMERT, 122 Atlantic 307 (N. J.); HOIGEN VS. COMMONWEALTH, 142 Ky. 722, 135 S. W. 311.

In these cases, the elements of responsibility and control are emphasized as the result of requiring not only that the person who practices a profession shall be duly licensed and regulated but that the owner of the business resulting from the professional practice

shall likewise be a licensed practitioner. The substantial relation to the public welfare is evident. The arguments of the appellant are strangely reminiscent of those advanced by the opponents of the laws first passed to regulate the professions of law and medicine, to wit, that the true purpose and intent of the statutes was to create a monopoly for the licensed practitioners.

V. The Act of May 13, 1927 Does Not Deny to Appellant the Equal Protection of the Law.

It is argued that the Act of May 13, 1927 denies to the appellant the equal protection of the law, in violation of the 14th Amendment, by reason of the fact that the act became effective only as of May 13, 1927, thereby permitting all persons, partnerships or corporations owning or conducting pharmacies prior to such date to continue to own and conduct such pharmacies as were in existence at that time. Such is the effect of the proviso to Section 1 of the Act.

It has been decided in innumerable cases that statutory changes must have a beginning, and that the fixing of a date as of which the statute shall become effective and a classification of the persons upon whom it shall operate as of that date is not inconsistent with the 14th Amendment. In Sperry and Hutchinson Company vs. Rhodes, 220 U. S. 502, 55 L. Ed. 561, 31 Sup. Ct. Rep. 490, Mr. Justice Holmes, in rendering the opinion of this Court, said (p. 505):

> "But the 14th Amendment does not forbid statutes and statutory changes to have a beginning and thus to discriminate between the rights of an earlier and later time."

In Dent vs. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231, this Court had under consideration a statute of the State of West Virginia relative to the practice of medicine, which authorized the con-

tinuance of such practice within the State by all practitioners who had been practising a specified number of years prior to the enactment of the statute. It was held that the exemption of certain persons who had previously been practising medicine from the provisions of the statute was not discriminatory or inconsistent with the 14th Amendment.

A statute of the State of New York regulating the practice of dentistry, which made a similar exception in the case of dentists who had been practising prior to a specified date, was involved in PEOPLE vs. GRISWOLD, 213 N. Y. 92, 106 N. E. 929. The court said, in disposing of the objection made to the exempting of certain dentists from the provisions of the Act (p. 931):

> "The appellant has no grievance from the provision that those duly licensed and registered as dentists in this State prior to the first day of August, 1895, are deemed licensed to practice. It is the rule for such acts to preserve the status of those lawfully engaged in the pursuit regulated."

Similar exemptions have been upheld in STATE vs. CREDITOR, 44 Kansas 565, 24 Pac. 346; *Ex Parte* WHITLEY, 144 Cal. 167, 77 Pac. 879; and HODGEN vs. COMMONWEALTH, *supra*.

VI. THE REGULATION OF A PROFESSION INVOLVES PRINCIPLES DIFFERENT FROM THOSE APPLICABLE TO THE REGULATION OF AN ORDINARY TRADE OR OCCUPATION

The appellant has argued at great length that the Act of May 13, 1927, cannot be sustained as an exercise of the police power because there is no reasonable or logical connection between the object in view and the means adopted to accomplish the object. Numerous cases are cited in support of the various propositions

advanced in support of this contention, which is fundamental to the appellant's case. It is true that in these cases the regulatory statute attacked was declared unconstitutional, but these cases deal with regulations affecting ordinary trades and occupations or the conduct of businesses. KEYSTONE GROCERY AND TEA COMPANY VS. WILLIAM A. HUSTER, No. 10922. In Equity, Circuit Court of Allegheny County, Maryland, and GREAT ATLANTIC AND PACIFIC TEA COMPANY VS. DOUGHTON, Sup. Ct. of Waite County, North Carolina (Appellant's Brief, p. 39) deals with statutes which attempted to regulate chain stores as such. CITY OF DANVILLE VS. QUAKER MAID, INC., 211 Ky. 677, 278 S. W. 98, (Appellant's Brief, p. 42) involved a law taxing cash and carry stores. STATE VS. DONALDSON, 41 Minn. 74; NOEL VS. PEOPLE 187 Ill. 587; SADLER VS. PEOPLE 188 Ill. 243; STATE OF SOUTH DAKOTA VS. WOOD, 215, N. W. 487; STATE VS. CHILES, 257 Pac. 366, (Appellant's Brief, p. 50) concern statutes which attempted to regulate the sale of proprietary and patent medicines. PEOPLE VS. RISCH, 197 N. Y. 143 (Appellant's Brief p. 55) deals with a statute regulating undertaking.

The determination of the constitutionality of the the statutes reviewed in these cases involves questions which are different from those under consideration in the present case. The regulation of the practice of law, medicine, dentistry and pharmacy is not the same as the regulation of an undertaker, a merchandising business and other similar occupations and businesses. The practice of a profession is not a business open to all, but a personal right in the nature of a franchise conferred by the State by virtue of which the State claims the right to determine the conditions under which the franchise may be exercised.

RE COOPERATIVE LAW CO., 198 N. Y., 479, 92 N. E. 15, involved an application by a corporation claiming to have been lawfully organized with power to carry

on the business of practicing law for approval of its existence and the continuance of its business for the purposes designated. A certificate of approval which had been previously granted was vacated and from the order vacating such certificate an appeal was taken to the Court of Appeals of New York. In reviewing the order vacating the certificate of approval, the Court said (p. 16):

> "* * * The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited, but must be earned by hard study and good conduct. It is attested by a certificate of the Supreme Court, and is protected by registration. No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension or removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by statute and the rules of the courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in. As it cannot practice law directly, it cannot indirectly by employing competent lawyers to practice for it, as that would be an evasion which the law will not tolerate. 'Quando aliquid prohibetur ex directo, prohibetur et per obliquium.' Co. Lit. 223."

The distinction between cases involving the constitutionality of statutes regulating the practice of a profession such as medicine or pharmacy and statutes

regulating the pursuit of an ordinary trade or occupation was recognized clearly in the case of GRAVES vs. MINNESOTA, *supra*. The opinion of this Court in that case concludes (p. 429):

> "This conclusion is in harmony with the decisions in other state courts involving the constitutional validity of statutes regulating the practice of medicine or dentistry which contain similar or analogous provisions, as well as with the earlier Minnesota decisions. * * * * And it is not in conflict with the decisions in SMITH vs. TEXAS, 233 U. S. 630, 58 L. ed. 1129, L. R. A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420, and STATE vs. WALKER, 48 Wash. 8, 92, Pac. 775, 15 Ann. Cas. 257, on which the plaintiff in error relies, which dealt with statutes attaching unreasonable and arbitrary requirements to the pursuit of the employments or trades of locomotive engineers and barbers. These manifestly involve very different considerations from those relating to such professions as dentistry requiring a high degree of scientific learning."

VII. CONCLUSION

In conclusion, we beg to submit that the Act of May 13, 1927, is an enactment of the Legislature of the Commonwealth of Pennsylvania, regulating the practice of pharmacy therein, that it was so enacted in pursuance of the police power inherent in that Commonwealth, that it is neither unreasonable nor arbitrary and that it has a substantial relation to the public health, safety and welfare.

The Act does not deprive the appellant of its business and property rights without due process of law, nor does it deny to appellant the equal protection of the law. We contend that it is subject to no constitutional or other objections and should be held to be a

proper exercise of the police power and a constitutional enactment.

We therefore respectfully request that the decree of the Court below be affirmed.

PAUL C. WAGNER,
Deputy Attorney General;
THOS. J. BALDRIGE,
Attorney General
For the Commonwealth of
Pennsylvania,
Attorney for Appellees.

"APPENDIX A"

George B. Evans, *A Corporation* vs. The Honorable Thomas J. Baldrige, Et Al.	In the Court of Common Pleas No. 4 of Philadelphia County. March Term, 1927. No. 19197.

OPINION

Per Curiam:

The petition prays the Court to declare that a certain Statute enacted by the General Assembly of the Commonwealth of Pennsylvania, approved by the Governor May 13, 1927 (P. L. 1009), insofar as the same affects the petitioner's right to establish or own pharmacies or drug stores in addition to those now owned by it, and to conduct its business therein in accordance with the Act of May 17, 1917 (P. L. 208), is unconstitutional and invalid.

Upon the presentation of this petition a rule was granted on the Attorney General of the Commonwealth, the members of the Pennsylvania Board of Pharmacy and the District Attorney of the County of Philadelphia, to show cause why the judgment prayed for should not be entered. All of the respondents appeared and answered.

The matter was argued on petition and answers. While certain of the petitioner's averments are denied, the basic facts of the case are undisputed. Upon them the question of the validity of the Statute attacked by the petitioner may satisfactorily be disposed of.

The Act referred to in the petition is entitled

A Supplement

To the Act approved the seventeenth day of May one thousand nine hundred and seventeen (Pamphlet

Laws, two hundred and eight), entitled "An Act to regulate the practice of pharmacy and sale of poisons and drugs and providing penalties for the violation thereof, defining the words 'drugs' and 'poison' and providing for the appointment of a board which shall have in charge the enforcement of said law and the power to make rules and regulations for the enforcement of said law and providing for the purchase of samples of drugs for determining their quality, strength and purity," regulating the ownership of pharmacies and drug stores and providing penalties.

By its general terms this Act forbids the carrying on or operation of any pharmacy or drug store unless its proprietor is either

(a) A licensed pharmacist,

(b) A co-partnership, each member of which is a licensed pharmacist, or

(c) A corporation, all of whose members are licensed pharmacists.

This prohibition does not apply to the case of a store where the only drugs or medicines sold are proprietary medicines, or commonly used household goods sold or offered for sale in packages put up, ready for sale to customers, by pharmacists, manufacturing pharmacists, wholesale grocers or wholesale druggists.

The Act provides that it shall not prevent the carrying on of a pharmacy or drug store by its present proprietor although such proprietor may not come within any of the categories above enumerated.

The proprietor of a pharmacy, whose present qualifications do not comply with the general requirements of the Act, shall not, however, establish, own or conduct another or additional pharmacy; and no such proprietor who shall cease to own a pharmacy shall thereafter become again the owner of such establishment, without having obtained a license to practice pharmacy.

In the event of the death of an unlicensed individual

pharmacist who is now the owner of a drug store, the business may be continued therein by his or her personal representative for such a period as may be necessary for the settlement of the estate.

Suitable provision is made for the enforcement of compliance with the terms of the Act by the imposition of fines. The terms "drugs," "drug store," "pharmacy" and "licensed pharmacist" are defined by the Act to which this Act is a Supplement.

The underlying purpose of the Statute seems to be to bring about the ownership of pharmacies or drug stores by licensed pharmacists or by associations, incorporated or unincorporated, of licensed pharmacists. It recognizes the right of ownership now existing in such establishments already controlled by persons not licensed as pharmacists, but prohibits the acquisition of further rights of a similar character.

George B. Evans, the petitioner, is a corporation. Its capital is $1,100,000. Its stock is divided among approximately one hundred and twenty-five persons, of whom, however, only its president and approximately half a dozen others happen to be licensed pharmacists. The company is engaged in the retail drug business, which is carried on through seven retail drug stores or pharmacies. Each of these is under the supervision of a duly licensed pharmacist, whose duties are confined to it alone. It is claimed that the corporation intends to increase the number of its drug stores, and that the removal of some of those that it now operates, from the leased properties which they presently occupy may upon the expiration of the leases on which such properties are held become necessary.

The petitioner asserts that its business is interfered with by the Act of 1927, above referred to, because that Statute prevents it from establishing additional drug stores and renders it impossible to move its existing drug stores to new locations, thus subjecting it to unreasonable exactions on the part of its landlords. It

is contended that this, in effect, deprives the petitioner of its property without due process of law, and that it is thereby denied the equal protection of the law. It is urged that the Statute so far as it affects the business of the petitioner, offends against the first section of the Fourteenth Amendment of the Constitution of the United States and is, therefore, invalid and of no effect so far as concerns the petitioner.

It may be observed, in passing, that the complaint that the Act under consideration places the petitioner and other parties similarly situated at the absolute mercy of their landlords when their current leases expire is without foundation. True it is that it forbids the present owners of drug stores who are not licensed as pharmacists to establish, own or conduct "other or additional pharmacies or drug stores"; but it was manifestly not intended by the Legislature to leave them *adscriptos glebae*. The use of the word "or" in the phrase quoted is not disjunctive, but conjunctive. It introduces another word intended to explain that which precedes it. By the word "additional" the meaning of the word "other" is limited and clarified. All that the phrase means is that under no circumstances shall the number of the drug stores of a proprietor not qualified under the general terms of the Statute be increased. A drug store now owned by such a proprietor may be moved to a new location without compliance with the general rule that the owner of a drug store must be a licensed pharmacist, or an association, corporate or unincorporated, composed exclusively of licensed pharmacists.

The only practical effect of the Statute upon the petitioner is to preclude it from extending its business activities by setting up additional pharmacies, unless its present stockholders dispose of their shares of stock to licensed pharmacists, or themselves procure licenses to practice pharmacy. This, however, is undoubtedly a restriction upon its business, and for that

interference with its rights no compensation is provided.

The fact just pointed out, however, does not establish the invalidity of the Act of May 13, 1927.

The Commonwealth, as sovereign, may, within limits, cause, without making compensation therefor, discomfort, injury, loss or even ruin to a part of the community in the interest of the greater part. This right exists by virtue of its duty to provide for the health, the safety and the morale of its people. To enable it to perform that duty government is vested with what is known as the police power. That term, necessarily perhaps, is without an exactly formulated meaning. It was said by Mr. Justice Holmes to be an expression "convenient to conciliate the mind to something that needs explanation." By the exercise of this power, private property may be so regulated and controlled by the appointed agencies of the State that its use shall not be harmful to the members of the community at large. Regulation under a proper exercise of the police power is due process of law, not confiscation, even though property is thereby taken, injured or destroyed. Under what circumstances and to what extent this power is to be exercised is, in the first instance, to be determined by the Legislature. Whether the subject which the Legislature purposes to regulate is a proper subject for regulation and, if so, whether the regulation attempted has exceeded the proper limit are questions for the courts. The latter, however, are "concerned only with the questions whether the Statute has a recognized police purpose and whether it has a reasonable relation to the object to be attained": White's Appeal, 287 Pa. 259; Harris vs. State Board of Optometrical Examiners, 287 Pa. 531.

The question whether the regulation of pharmacies (the word pharmacy is defined by the Act of May 17, 1917, P. L. 208, as "a retail drug store, or any place where drugs, medicine or poisons are compounded,

dispensed, prepared or sold at retail," and is used in that sense in the Act under consideration), is within the police power of the Commonwealth is a simple one. The protection of the public health is today one of the great purposes of all civilized governments. The term "drug" as used in the Acts just referred to "includes all medicine and preparations recognized by the United States Pharmacopœia, the National Formulary, or the American Homeopathic Pharmacopœia, for internal or external use, and any other substance or mixture of substances, intended to be used for the cure, mitigation or prevention of disease of either man, or other animals." Obviously, nothing touches the health of the people more closely than the conduct of drug stores or pharmacies, and control over them has long been exercised by our State authorities.

The great question in the case is whether the effort of the Legislature to bring all retail drug stores into the ownership of licensed pharmacists has a reasonable and substantial relation to the purpose of preserving and improving the health of the people of Pennsylvania. Without such relation, interference with the rights of the petitioner and others similarly situated is not to be tolerated. It was said by our Supreme Court, in WHITE'S APPEAL, *supra*, per KEPHART, J.: "There is one matter that is quite certain—the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety and general welfare. The exercise must have a substantial relation to the public good within the spheres held proper. It must not be from an arbitrary desire to resist the natural operation of economic laws, or for purely æsthetic considerations."

After much deliberation, the Court has reached the conclusion that the question last stated must be answered in the affirmative. It is true that the advantage

to the public health of bringing the ownership of retail drug stores into the hands of licensed pharmacists is not at first sight as apparent as is that of requiring the compounding of medicines and the sale of drugs to be in the actual charge of those whose qualifications as pharmacists are vouched for by the license of the Pennsylvania Board of Pharmacists; but it, nevertheless, exists.

The pharmacist in charge of a retail drug store, if its proprietor does not conduct the business himself, must always be selected by the latter. Necessarily, all pharmacists are not of the same professional skill; all are not characterized by the same fidelity to duty; all are not entitled to the same trust and confidence. The proprietor who is a licensed pharmacist, or a group of such persons, is in a far better position to select a reliable man to attend to the practical work of the pharmacy than is the ordinary layman, or an association of men unacquainted with drugs. Also, the proprietor qualified as required by the Act can supervise more intelligently and effectively the conduct of those employed in the drug store. The purchase of supplies in the shape of drugs for sale and retail can be made by the proprietor licensed as a pharmacist with better judgment and with less danger of deception than in the case of a proprietor not so qualified. There can be little doubt that to bring the proprietor of a drug store into direct relation with the Pharmacy Board will facilitate the efforts of that body to enforce the laws governing the operation of retail drug stores. All these facts cannot but result in an improved service to the public, and thereby tend very materially to promote the health of the people. We are of the opinion that the relation between the measure proposed and the welfare of the community as a whole is reasonable and substantial. The fact that the Legislature has made an exception in favor of the present owners of

drug stores who are not licensed pharmacists is not evidence against this view.

In our opinion the Act of May 13, 1927, presents a case of the proper exercise of the police power of the Commonwealth. Its application to the petitioner and others similarly situated is not confiscatory. They are not thereby deprived of due process of law. They are not denied equal protection of the law, since all in the same class are placed upon the same footing. The statute in question does not offend against the organic law of the land, and is, therefore, valid and operative. A declaratory judgment has accordingly been entered to that effect.

Office Supreme Court, U. S.
FILED
OCT 8 1928
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 14

LOUIS K. LIGGETT COMPANY,

Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,

Respondents.

NOTICE OF MOTION, PETITION AND BRIEF FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

SOL M. STROOCK,
Amicus Curiae.

PRESS OF FREMONT FAYNE, NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY, Appellant, v. THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al., Respondents.	No. 673.

Notice of Motion for Leave to File a Brief as Amicus Curiae.

Sir:

PLEASE TAKE NOTICE that the undersigned acting as counsel for a party interested in the questions involved in the above entitled suit will move this Court at the opening of the Court on the 8th day of October, 1928, or as soon thereafter as counsel can be heard for leave to file a brief as amicus curiae, and for such other and further relief as may be proper.

Dated, New York, October 4th, 1928.

Yours, etc.,

SOL M. STROOCK,
Amicus Curiae.

To

GEORGE G. CHANDLER, Esq., ROY M. STROOCK, Esq.,
and OWEN J. ROBERTS, Esq.,
Attorneys for Appellant.

Honorable THOMAS J. BALDRIGE,
Attorney General and
Honorable PAUL C. WAGNER,
Deputy Attorney General,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY,
Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,
Respondents.

Petition for Leave to File Brief as Amicus Curiae.

The undersigned respectfully petitions this Honorable Court for leave to file a brief as *amicus curiae* in the above entitled matter.

Your petitioner applies as counsel for Whelan Drug Co., Inc., a New York corporation.

The Company was incorporated under the name of United Retail Chemists' Corporation and qualified and was licensed to carry on the drug business in the State of Pennsylvania on May 14, 1920. At the present time, it operates stores in Easton, Pa., and Chester, Pa., conducting a retail drug business including the compounding of prescriptions, all in accordance with the laws of the State of Pennsylvania. These stores were in operation prior to the passage of the Amendment of May 13, 1927, to the Act approved May 17, 1917, the constitutionality of which amendment has been attacked in these proceedings.

Definite plans have been made by Whelan Drug Co., Inc., for the establishment of new stores in Pottsville, Lebanon, Lancaster and Newcastle, Pennsylvania.

The sole stockholder of Whelan Drug Co., Inc., is not a registered pharmacist. The corporation has twelve directors, three of whom are pharmacists registered in states other than Pennsylvania. Of the seven corporate officers, three are pharmacists registered in states other than Pennsylvania.

Notice of this application having been served upon counsel for the respective parties in the above entitled suit, this motion is now respectfully submitted for the consideration and action of the Court.

Dated, New York, October 4th, 1928.

SOL M. STROOCK,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1927.

LOUIS K. LIGGETT COMPANY,
Appellant,

v.

THE HONORABLE THOMAS J. BALDRIGE, ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA, CHARLES C. CAMPBELL, CHARLES F. KRAMER, et al., etc., et al.,
Respondents.

BRIEF SUBMITTED ON BEHALF OF WHELAN DRUG CO., INC.

Statement.

Whelan Drug Co., Inc., files this brief *amicus curiae* in support of the position of the appellant that the Act of May 13, 1927, amending the Act of May 17, 1917, enacted by the Pennsylvania Legislature, is unconstitutional. Whelan Drug Co., Inc. (formerly known as United Retail Chemists' Corporation), is vitally interested in this contention. It is a New York corporation licensed since 1920 to carry on the drug and pharmacy business in the State of Pennsylvania. Prior to the passage of the Amendment of 1927, it operated two stores in Pennsylvania. Definite plans have been made for the establishment of four new and additional stores. The sole stockholder of this corporation is not a registered pharmacist.

I.

The Act requires only corporate stockholders to be registered pharmacists.

The Amendatory Act of May 13, 1927 (set forth in full on page 10 of Transcript of Record) applies to corporations, associations and copartnerships,

> "unless all the partners or members thereof are licensed pharmacists."

It is obvious that the word "partners" can apply only to associations and copartnerships. One must assume that the Legislature of Pennsylvania used the term in its technical sense. On the other hand, "members" refers to the stockholders of a corporation.

Fletcher on Corporations (1917) (Sec. 3953) states:

> "Most of the modern business corporations are stock corporations,—that is, corporations having a capital stock divided into shares. *Persons who own these shares are the members of the corporation.*" (Italics ours.)

The Pennsylvania Corporation Law refers at times to "stockholders" and at other times to "members" of the corporation. The practically interchangeable use indicates that "members" means "stockholders," or the composite body constituting a non-stock corporation.

The Pennsylvania Act of 1874, Section 5, as amended by the Laws of 1891, page 61, Section 5, and Laws of 1927, Act No. 417, approved May 6, 1927, supports this conclusion. It provides, among other things:

> "The number of directors or trustees shall not be less than three; one of them shall be chosen president by the directors, or by the *members*, of the corporation, as the by-laws shall direct. The *members* of said

corporation may at a meeting to be called for that purpose, determine, fix or change the number of directors or trustees that shall thereafter govern its affairs * * *."

Directors are not required by statute to be stockholders (Laws 1919, p. 67).

The statute directs that the business of every corporation created thereunder shall be conducted by the president, board of directors or trustees, a secretary or clerk, a treasurer and such other officers as the corporation authorizes (Act of 1874, Section 5, as amended by the Laws of 1891, p. 61, Section 5, and Laws of 1927, Act 417, approved May 6, 1927). By virtue of the same provisions, the directors are chosen by the "*stockholders or members*" and the directors may also choose the president of the company who must be a director.

It is therefore apparent that the affairs of a corporation organized under the laws of the State of Pennsylvania may be managed in their entirety by a group of persons who are not stockholders.

It is a fair assumption that the Pennsylvania legislature in passing the Amendment of May 13, 1927, did so in the light of the Pennsylvania Corporation Law. These statutes are fundamentally akin to the corporation laws in the remaining States of the United States.

II.

Corporate business is within the protection of the Federal Constitution.

Both Louis K. Liggett Company and Whelan Drug Co., Inc., are corporations organized under the laws of states other than Pennsylvania.

All corporations, both domestic and foreign, are entitled to the benefits and protection of the Fourteenth Amend-

ment and other applicable portions of the Federal Constitution.

Power Mfg. Co. v. *Saunders* (1927), 274 U. S. 490;
Kentucky Finance Corporation v. *Paramount Auto Exchange Corporation* (1922), 262 U. S. 544;
Leecraft v. *Texas Company* (1922), 281 Fed. 918 (Writ of Error dismissed, 262 U. S. 732).

The business of an individual or corporation is a property right, and it is in the protection of this right that the Amendatory Act of May 13, 1927, is here assailed.

Truax v. *Corrigan* (1921), 257 U. S. 312;
Duplex Printing Press Co. v. *Deering* (1921), 254 U. S. 443.

We have no quarrel with the right of a state legislature to enact reasonable regulations of business in general and particularly in respect to the compounding and selling of drugs and medicines. Under the police power, various such statutes have been enacted by practically all the states of the Union, and Pennsylvania has sought to protect the citizens of her State by the Act of May 17th, 1917 (P. L. 208; Pa. Stats. 9301 ff), containing a general revision of the Pharmacy Law; by the Act of May 26th, 1921 (P. L. 1172; Pa. Stats. 1924 Supp. 9329 aff.), requiring that every drug store be registered by the State Board of Pharmacy and that the business of each registered drug store be under the supervision of a registered pharmacist; by the Pure Drug Law of May 8, 1909 (P. L. 470; Pa. Stats. 9377 ff), forbidding the adulteration or misbranding of drugs and prescribing a recognized standard of purity; and other measures of like character.

It is our contention that the statute in question is invalid for the following reasons:

(a) It serves no public purpose, but constitutes an arbitrary interference with constitutional rights;

(b) It is not what it purports to be, namely, a health ordinance, but rather an unreasonable regulation of trade and deprives the parties within its purview of their property without due process of law; and

(c) It impairs unreasonably freedom of contract.

III.

The statute is an arbitrary interference with constitutional rights.

When analyzed, the statute merely requires that persons who have no part in the active conduct of the corporation be registered pharmacists, whereas those persons who are in daily contact with the business and its direction may be of any training, business or profession.

While it is true that the legislature is accorded broad discretionary powers in determining the need for legislation and its probable effect, yet such discretion is subject to the ever scrutinizing eye of the courts charged with the duty of preserving constitutional rights.

As this Court stated in *Dobbins* v. *Los Angeles* (1904), 195 U. S. 223, at page 235:

> "It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But, notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances and even legislative enactments undertaking to regulate useful

> business enterprises, are subject to investigtaion in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

And in *Lawton* v. *Steele* (1893), 152 U. S. 133, 137:

> "In other words, its (referring to the legislature) determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The label which the State of Pennsylvania chose to place upon the statutes is not binding upon this Court.

> "It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals is not conclusive upon the Courts."
>
> Holmes, J., in *Otis* v. *Parker* (1903), 187 U. S. 606, 608.

IV.

The statute unreasonably regulates legitimate business.

Even were the statute inspired by the best of motives, reasonable means must be employed to attain the end. If the means are not so fashioned, the Court may delve beneath the avowed motives of the legislature. This has been done many times in the past.

The Supreme Court of Illinois in holding invalid a statute prohibiting provisions to be exposed for sale where

dry goods, clothing, jewelry and drugs were sold (*City of Chicago* v. *Netcher* [1899], 183 Ill. 104, 112), stated:

> "It is plain that its object is not to protect the health, morals or safety of the public, or to accomplish any object falling within the police power. It is a mere attempt to deny a property right to a particular class in the community where all other members of the community are left to enjoy it."

A Pennsylvania statute forbade the use of shoddy in mattresses. This Court in *Weaver* v. *Palmer Bros. Co.* (1926), 270 U. S. 402, enjoined the enforcement of the Act on the ground that it was a purely arbitrary means of controlling an otherwise "legitimate and useful" business.

Even granting that the prevention of the sale of short weight loaves of bread was within the purview of legislative enactment, it was held in *Burns Baking Co.* v. *Bryan* (1924), 264 U. S. 504, that an act establishing a standard weight loaf of bread with provision for a maximum weight was unconstitutional, as—

> "• • • unnecessary, unreasonable and arbitrary • • •. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restraints upon them • • •" (pp. 512-513).

California attempted to require private carriers to obtain a permit and register as public carriers under the guise of regulation of the use of the public highways. This Court in *Frost* v. *Railroad Commission of the State of California* (1926), 271 U. S. 583, discerned that the primary purpose was to protect the business of common carriers by controlling competitive conditions, rather than protection or conservation of the highways, and declared the act invalid.

Yick Wo v. *Hopkins* (1886), 118 U. S. 356, involved the validity of an ordinance of the City of San Francisco, making it unlawful for any person to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco, without having first obtained the consent of the Board of Supervisors, unless the same be located in a building constructed either of brick or stone. The ordinance was denounced as unreasonable and arbitrary.

There has been no contention in this litigation that the appellant, or any other pharmacy conducted by a corporation of which the members are not registered pharmacists, has sold inferior drugs or in any other manner impaired or endangered the public health. It is likewise apparent that the business of such companies has been conducted strictly in accordance with governing provisions of the Pennsylvania statutes. The drugs dispensed have been equal in purity to the standards prescribed. Each store conducted by such corporations has been and is under the personal supervision of a registered pharmacist. There is nothing in the Amendment of May 13, 1927, which places, or purports to place, upon the owner any additional duty; it does no more than limit without reasonable basis the class of persons who may own pharmacies.

Recent statutes in Arizona and South Dakota, permitting only licensed pharmacists to sell patent medicines, have been declared unconstitutional.

> *State* v. *Childs* (Ariz. 1927), 257 Pac. 366;
> *State* v. *Wood* (So. Dak. 1927), 215 N. W. 487.

While it is true that these statutes are more limited in character than the one here involved, yet the reasoning of the Court in each instance upholds our position.

In the Arizona case, the Court stated (p. 370):

> "We do not wish to be understood that we hold the power of the Legislature to legislate in regard to the

sale of drugs, medicines, or poisons is denied. On the contrary, we think all reasonable provisions protecting the health and safety of the public by regulating the prescribing, compounding, and dispensing of such articles are highly commendable and should be encouraged, *but when an attempted regulation on its face apparently has no effect except to grant a monopoly of the sale of certain articles to a special class under conditions which can in no manner benefit the public, such regulation cannot be sustained.*" (Italics ours.)

The South Dakota Court based its result upon the following (p. 489):

> "Unless the sale of such medicines by pharmacists is regulated, then requiring such sales to be made by pharmacists does not regulate their sale, but merely gives to a class the exclusive right to make unregulated sales of such medicines. *Unlimited and unregulated sales by pharmacists may be just as extensive and quite as harmful as unlimited sales by others* • • •. *It would seem to be an unreasonable exercise of the police power to limit sales to the profession, without requiring anything of the profession to safeguard the public.*" (Italics ours.)

The "chain store" with extensive branches is entitled to no more consideration than the smallest pharmacy conducted by an individual, but when the statutes does nothing more than limit without apparent reason the persons who may engage in this business

> "• • • it is the right, as well as the duty, of the Court, to pronounce it invalid, as in excess of legislative power and an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful occupation."
>
> *State* v. *Donaldson* (1889), 41 Minn. 74.

The Act here involved goes far beyond the general line of statutes regulating the sale of drugs which have been upheld by the Courts.

The statute in *State Board of Pharmacy* v. *Matthews* (1910), 197 N. Y. 353, is typical. It required that sales of drugs, medicines and poisons be made by a licensed pharmacist, or in the presence or under the supervision of the licensed pharmacist or druggist. Such a statute is a salutary measure and already covered by the Pennsylvania enactments previously referred to, which are now in effect and complied with by the various chain drug stores operating in the State.

V.

Freedom of contract is impaired.

The appellant, Louis K. Liggett Co., and Whelan Drug Co., Inc., have valuable property rights in the business which they are now conducting in the State of Pennsylvania, and shareholders have a free and unrestricted sale of their stock.

The 1927 Amendment in its practical effect severely restricts the sale of a store or its business by one of the banned corporations, and brings within narrow confines the class of persons to whom stockholders may sell or transfer their stock. Similar restrictions have on past occasions been condemned by the courts.

Coppage v. *Kansas* (1914), 236 U. S. 1, held unconstitutional a statute making it criminal for an employer to require as a condition of employment that the employee refrain from becoming or remaining a member of any labor organization while so employed.

Fairmont Creamery Co. v. *State of Minnesota* (1927), 274 U. S. 1, overturned a statute prohibiting creameries to purchase cream at higher prices in one locality than in another after allowance for the difference in cost of transportation.

An ordinance forbidding colored persons to occupy

houses in blocks where the greater number of houses were occupied by white persons was held to be an unreasonable restraint upon the power of alienation on contract.

Buchanan v. *Warley* (1917), 245 U. S. 60.

Respectfully submitted,

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